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September 25, 2003

VIA FACSIMILE & OVERNIGHT COURIER

Mark Krausse
Executive Director
FAIR POLITICAL PRACTICES COMMISSION
428 J Street, Suite 620
Sacramento, CA 95814-2329

**Re: Rudy Olmos - RESPONSE TO MOTION TO STRIKE
Danny Lynn Gamel, et al. v. FPPC
Fresno County Superior Court Case No. 01 CE CG 03495
FPPC No.: 99/193
OAH No.: N2001020159**

Dear Mr. Krausse:

In response to the motion to strike, we are submitting the following amended brief with this letter.

As you acknowledged in your September 17, 2003, letter, our office did not timely receive notice of the briefing deadline because your September 5, 2003, letter was sent to our former address, a post office box which was closed about 10 months ago. As a result, we were also not aware that there was a 5-page limit to the brief. Had we known that, we would have complied.

In submitting the brief as we did, we were not aware of a 5-page limit and did not become aware of that requirement until after our brief was submitted. Our brief is double spaced and if converted to single space would be about nine pages in length. As amended, the brief attached is within the 5-page limit.

In a review of this matter at this point, I submit that a procedural history of the case and summary of the pertinent facts is important, since a great deal of time has lapsed since we were

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Mark Krausse, Executive Director
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last before the FPPC. It appears that counsel for the complainant does not want you to review the record, which contains substantial information of mitigation as to Rudy Olmos in reassessing the penalty. It also appears that counsel for the complainant does not want you to even review the transcript, because considering the actual evidence "would needlessly protract this proceeding." I submit that the reason we are where we are today is that there has not been careful consideration of the record or certain findings of fact were not put on the record.

If you see no value in the procedural history information or the summary of pertinent facts, then we certainly accept that you have the right to strike those portions. Also, if you believe that there should be no consideration of the transcript in the record as part of this review process, then we would simply like to make a record of that fact. It is our view that when a matter is remanded by the court for further review or due consideration, it is not an opportunity to reopen the record or to relitigate what has already been decided, and also that the reconsideration should be based on a further review and consideration of what was presented earlier in light of the court's ruling.

Due consideration of the transcript and prior appeal briefs would provide the FPPC with a thorough summary of the pertinent facts and the procedural history. If the FPPC sees no value in spending any time reviewing the transcript and the record at this point, we certainly understand, as that is why we appealed in the first place and why the court remanded this portion.

As a courtesy to you, please accept this letter as formal notice that my client and I do not intend to attend the October 2, 2003, gathering. What we have to say is already in the brief. Unless you have further questions for us, I do not see much value in our repeating in your presence what we have presented in written form.

Sincerely,



Gary L. Huss

GLH:dat
cc: Steven Benito Russo
Enclosure (Amended Brief)

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RUDY MICHAEL OLMOS

6
 7
 8 **BEFORE THE**
 9 **FAIR POLITICAL PRACTICES COMMISSION**

10
 11 In the Matter of:

12 **DANNY LYNN GAMEL and RUDY**
 13 **MICHAEL OLMOS,**

14 Respondents.

) FPPC No.: 99/193
) OAH No.: N2001020159

) **RUDY MICHAEL OLMOS' AMENDED**
) **BRIEF FOLLOWING REMAND BY**
) **SUPERIOR COURT**

15
 16 Commission Meeting Date: October 2, 2003

17 **I. INTRODUCTION**

18 Respondent, having received the brief of the Enforcement Division responds as
 19 follows:

20 **II. ARGUMENT**

21 The theory of the FPPC was that Mr. Gamel had asked his employee, Mr. Olmos,
 to make a contribution, and then later reimbursed Mr. Olmos for it. If credible evidence could be
 22 presented to show that a reimbursement really occurred, that would support this finding. Absent
 such credible evidence, there was no evidence to support this finding.

Mr. Gamel testified that he did not make any such reimbursement. (C.T. p.
 396:14-25.) Mr. Olmos testified that he made his contribution as a long term investment, and
 recalled that Mr. Gamel had asked him to make the contribution, but had not promised to
 reimburse him and, in fact, was not given any cash back later by Mr. Gamel. (C.T. pp. 404-405.)
 He made his contribution because it was a fun thing to do, he knew how Mr. Gamel was involved
 in the community, and he saw it as an investment on his part for the long term. Mr. Gamel had
 asked him to make other contributions as well. (C.T. p. 406:11-25.)

27 However, when specifically asked if Mr. Gamel reimbursed him for his \$975
 28 contribution, he testified, "NO, HE DID NOT." (C.T. p. 407:11-22.)

1 Thus, the two persons who purportedly were involved in the alleged "laundering"
2 of this donation each denied that it had occurred. No bank record evidence of Mr. Olmos
3 supported this reimbursement allegation.

4 When Mr. Kozub was pressed to explain this isolated conversation he claimed to
5 have had with Mr. Gamel about the alleged reimbursement for the contribution, he finally
6 admitted that he was "not sure" and that in thinking more about it, he and Mr. Olmos were
7 actually discussing their bonus checks, and it was probably the bonus checks that were being
8 discussed. He admitted telling the investigator that he had deposited that bonus money. (C.T. p.
9 378:6-25.) In short, Mr. Kozub was a witness who could not keep his facts straight and who, as a
10 disgruntled former employee, had a motive to lie and actually contradicted himself on many
11 material points.

12 Looking at the larger picture, the theory of the FPPC was that four employees had
13 been approached, asked to contribute by Mr. Gamel, and were all later reimbursed for their
14 contributions to Mr. Steitz' campaign. However, there was no evidence to support this theory as
15 to David Little and Richard Wright. Further, Mr. Olmos denied that it had occurred. That means
16 that of the four persons who were alleged to have been reimbursed, there was no competent
17 evidence that three actually were.

18 Judge Hamlin vacated the prior order imposing a maximum fine on Mr. Olmos
19 with a directive by this agency to complete its assessment of factors in aggravation and mitigation
20 and to **reassess the appropriate fine**. The implication in his order, especially since it was argued
21 that this penalty was excessive, was for the FPPC to revisit that issue. On the surface, the penalty
22 imposed on Mr. Olmos appeared to be excessive as a maximum fine on a first time violation.

23 Mr. Olmos contends that the penalty issue should not be decided without taking
24 additional evidence. The hearing that was held before was as to liability, not punishment.
25 Mr. Olmos denied laundering a contribution and, accordingly, there was no evidence present as to
26 any of the consideration for penalty. The record is devoid of any evidence being offered by
27 Mr. Olmos to that end.

28 Since the trial court had reversed and remanded this finding and requested that the
FPPC reassess this penalty, it would only seem reasonable to conclude that the trial court found
the record devoid of sufficient evidence upon which to support such an excessive penalty. For
that reason, it makes sense at this point to have a further hearing at which time Mr. Olmos would
be afforded a due process opportunity to address the numerous factors that the court expects the
FPPC to consider on remand. To skip past that procedural opportunity for Mr. Olmos would
circumvent the intent of the court, and likely cause the matter to be reversed and remanded again.

21 **A. Severity of Violation**

22 At this point, Judge Hamlin has found sufficient evidence to support a violation
23 and, accordingly, the liability issue is not contested at this point. Mr. Olmos does not dispute that
24 campaign money laundering is a serious or significant violation of the Act. However, where he
25 and the FPPC part company is on the issue of penalty. The FPPC apparently contends that any
26 violation of this provision of the Act warrants a maximum penalty assessment regardless of the
27 circumstances or severity or amount involved. In contrast, Mr. Olmos contends that violations of
28 this portion of the Act can involve a variety of conduct and varying circumstances. Some
violations are more egregious than others. The fact that a violation is found does not necessarily
mean that the conduct was particularly "egregious" in the spectrum of possible conduct. In this
case, at issue is a \$975 donation by an employee after he was asked by his employer to make that
donation. There was no evidence that they conspired over this donation. The notion of a
calculated conspiracy is simply the conclusion of the FPPC. More than likely, either out of loyalty
or fear as an employee, Mr. Olmos simply did as he was asked or directed to do by his

employer. It is as simple as that. Mr. Olmos had nothing to gain, other than maintaining his job and the good will with his employer.

In providing for a penalty up to a maximum of \$2,000 for each violation, the legislature must have intended that some scale of penalty severity be utilized by the FPPC. Otherwise, it would simply have enacted a law that stated that any violation would result in a set penalty of \$2,000 regardless of its severity.

A number of considerations should go into any assessment of the severity of the violation. For example, the amount of money should be considered. A small contribution might be viewed differently than a substantial contribution because the impact that contribution could have would vary in corrupting the process. Here, the contribution was small. Second, the number of acts or contributions by that person should be considered. Multiple laundering by one individual should be viewed more seriously than a first time offense. Here, there were not multiple violations by Mr. Olmos. This was the first and only violation on his part. Third, the sophistication and method used should be considered. Where an elaborate scheme is used, that would be more serious as opposed to a straight forward donation that was simply made upon request. Mr. Olmos did not conceal his donation. He simply responded to his employer's request and made the donation. There was no evidence that he did or said anything more than that.

Thus, the seriousness of the conduct can be both an aggravating and mitigating factor. Here, Mr. Olmos contends that as a first time offender, given the amount involved for a city council race and the fact that he made a donation in response to his employer's request, his conduct is more mitigating than aggravating.

B. Intent to Conceal, Mislead

Mr. Olmos made a donation at the request of his boss. It is as simple as that. There was no evidence of any intent on his part to conceal that donation. He simply wrote out the check and made the donation. He did not alter any reporting statements or destroy any evidence. The FPPC never gathered and presented any evidence of any concealment of that check or payment, or any conversation between Mr. Gamel and Mr. Olmos.

If there was an intent to avoid the campaign laws, Mr. Olmos submits that it was not his intent. He had no agenda or anything to gain. He simply responded to a request by his employer that a donation be made.

Interestingly, there was no evidence of any reimbursement being made other than the confused recollection of Frank Kozub that some money was given to Mr. Olmos, which he later said was a bonus payment, not the reimbursement of a donation.

Thus, Mr. Olmos submits that if there was an intent to conceal the source of a donation, that intent was not his. If there was an intent to mislead, it was not his intent. It is more reasonable that another party to this action had that intent on his own and simply approached employees to accomplish his own sole agenda, not the agenda of many.

The FPPC does not contend that Richard Wright, Frank Kozub or David Little had any such intent to conceal or mislead, and yet they were in no different position than Mr. Olmos. Are we to believe that they did not have that intent, but for some reason Mr. Olmos did? Further, the FPPC would argue that because Mr. Olmos said he did not get reimbursed, that he were deceptive in his testimony. However, following the rationale of the FPPC, then was Richard Wright and David Little also deceptive?

The truth of the matter is that Mr. Olmos was not reimbursed. There was no evidence of any reimbursement actually being paid by any documented instrument or transfer.

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1 **C. Deliberate Versus Negligent Violation**

2 Mr. Olmos had nothing to gain by making his donation, other than to keep his boss
3 happy. He had never been involved in such a donation in the past. He likely did not know all of
4 the laws applicable to political donations. He simply responded to a donation request and made
5 it. Mr. Olmos' donation was one part of a multiple series of requests for donations by another
6 person who had his own separate agenda.

7 The FPPC characterizes this other person as the "mastermind." Said another way,
8 it was this other person who had the idea and simply tried to carry it out by asking people he
9 knew to donate to his candidate. There was no evidence that any scheme was discussed or that
10 any of the contributors knew that it might be considered improper to make a donation that way.
11 In each case it was as simple as one person having the idea, and that same person asking his
12 employees to make a donation without discussing it further. There was no intimation or hint that
13 they would be viewed as disloyal employees for not donating to the candidate. It is more
14 probable that each subjectively felt that they should make the donation because it was their boss
15 who was making the request.

16 In short, the violation by Mr. Olmos was not the result of any deliberate thought
17 on his part to violate any laws. Rather, it was the result of his own carelessness in responding to
18 such a donation request. There is a distinction to be drawn between the person who knowingly
19 discusses a campaign laundering scheme with another and agrees to assist, versus a person who is
20 asked by his boss to make a donation for an unexpressed agenda by the other party to launder a
21 donation, and who then simply responds by making that donation. As such, this factor is more
22 mitigating than aggravating as to Mr. Olmos.

23 **D. Good Faith Consult**

24 The fact is that no one consulted with the FPPC or any governmental agency
25 regarding the donations in question. Mr. Olmos' part was not so complex or sophisticated that
26 there was any thought of circumventing the campaign contribution laws. Had he questioned his
27 contribution and then made it, that might tend to show aggravation. However, here the facts
28 were that his involvement was rather simple and isolated. He was simply one of several
employees who were asked to make a contribution to the employer's candidate of choice. He
simply responded without further thought. He likely did not know there was any problem then
with his donation since he made it in his own name and was not trying to conceal his own
donation.

29 **E. Prior Record of Enforcement**

30 The fact that this is a factor of consideration supports the contention above that
31 the FPPC should allow for some room in its punishment to increase or enhance that punishment
32 for repeat offenders. The FPPC is so intoxicated with the fact that a violation has occurred that it
33 continues to insist that a maximum penalty is warranted. What is said about Mr. Olmos could be
34 said about anyone who violates this law, and thus if we follow that rationale, maximum penalties
35 would be the order of the day regardless of the circumstances. Unlike the FPPC, Judge Hamlin
36 disagreed and concluded that the penalty seemed excessive on its face, and that the record should
37 show due consideration of all of the above factors to support such a determination.

38 **V. CONCLUSION**

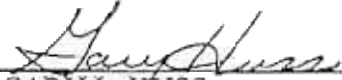
39 The FPPC is free to interpret the record in any light it chooses and has to date. At
40 this point, the issue is whether a maximum penalty should be imposed on Rudy Olmos for his
41 violation. The violation occurred, however a penalty less than the maximum is in order. The
42 FPPC can attempt at this point to do what is fair and reasonable in light of the record, or it can

1 ignore the letter and spirit of Judge Hamlin's order and simply maintain its original agenda and do
2 what it feels it can get away with. In the end, Mr. Olmos' arguments are not likely to be properly
considered by the FPPC.

3 Dated: September 25, 2003

WILD, CARTER & TIPTON
A Professional Corporation

By


GARY L. HUSS

Attorneys for Respondent
RUDY MICHAEL OLMOS

WILD, CARTER & TIPTON
246 West Shaw Avenue
Fresno, California 93755-6339

STATE OF CALIFORNIA, COUNTY OF FRESNO

I am employed in the County of Fresno, State of California. I am over the age of 18, and not a party to the action within; my business address is: 246 West Shaw Avenue, Fresno, California 93704.

On September 25, 2003, I served the document(s) described as:

**RUDY MICHAEL OLMOS' AMENDED BRIEF FOLLOWING REMAND
BY SUPERIOR COURT**

on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope at: Fresno, California, addressed as follows:

Steven Benito Russo
Chief of Enforcement
Julia Bilaver
Commission Counsel
FAIR POLITICAL PRACTICES
COMMISSION
428 "J" Street, Ste. 620
Sacramento, CA 95812

(BY MAIL) I am readily familiar with this business's practice for collection and processing of correspondence for mailing, and that correspondence, with postage thereon fully prepaid, will be deposited with the U. S. Postal Service on the date hereinabove in the ordinary course of business, at Fresno, California.

(BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee(s).

X

(BY OVERNIGHT COURIER) I caused the above-referenced envelope(s) to be delivered to an overnight courier service for delivery to the addressee(s).

(BY FACSIMILE) I caused the above-referenced document(s) to be faxed to the offices of the addressee(s).

Executed on September 25, 2003, at Fresno, California.

X

(STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

(FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Debra A. Taylor
DEBRA A. TAYLOR

1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA, COUNTY OF FRESNO**

3 I am employed in the County of Fresno, State of California. I am over the age of
4 18, and not a party to the action within; my business address is: 246 West Shaw Avenue, Fresno,
California 93704.

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7 **BY SUPERIOR COURT**

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9 **Steven Benito Russo**
10 **Chief of Enforcement**
11 **Julia Bilaver**
12 **Commission Counsel**
13 **FAIR POLITICAL PRACTICES**
14 **COMMISSION**
15 **428 "J" Street, Ste. 620**
16 **Sacramento, CA 95812**
17 **Telephone (916) 322-5660**
18 **Facsimile (916) 322-1932**

15 (BY MAIL) I am readily familiar with this business's practice for collection and
16 processing of correspondence for mailing, and that correspondence, with postage
thereon fully prepaid, will be deposited with the U. S. Postal Service on the date
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23 (STATE) I declare under penalty of perjury under the laws of the State of
California that the foregoing is true and correct.

24 (FEDERAL) I declare that I am employed in the office of a member of the bar of
25 this court at whose direction the service was made.

26 
27 **DEBRA A. TAYLOR**

28